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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
C. T. DOREMUS. } No. 367.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

This is an indictment for violating section 2 of the Harrison drug law (act of December 17, 1914, 38 Stat. 785, c. 1).

The indictment is in ten counts, the first two of which may be taken as typical. The first count states that the defendant, Doremus, a physician registered under the first section of the statute, sold a specified amount of the drug heroin, a derivative of opium, to one Alexander Ameris not in pursuance of a written order of Ameris to Doremus (as required by the first sentence of the second section of the statute) on an order form supplied by the Commissioner

of Internal Revenue; and the second count charges that the sale was not in the regular course of the professional practice of Doremus and not for the treatment of any disease from which Ameris was suffering (within exception a of section 2), but simply to gratify his appetite as an habitual user of the drug (R. 1, 2). The remaining eight counts charge similar transactions with other parties, involving sales of other proscribed drugs.

The defendant moved to quash the indictment (R. 7), and this motion was sustained (R. 9–16) upon the ground that the provisions of section 2 of the act of December 17, 1914, prohibiting the sale of the drugs in question except in pursuance of a written order from the purchaser upon an official order form issued by the Commissioner of Internal Revenue, or in the case of a physician dispensing the drug, to a patient in the course of his professional practice only, were unconstitutional. The case was then brought here by the United States under the provisions of the criminal appeals act (34 Stat. 1246).

A reading of the indictment shows that the first two counts and each succeeding two counts must be read together in order to make out the offense intended to be charged. According to the decisions of this court, however, in a case of this character the meaning or sufficiency of the indictment is not in question. The District Court having decided the case solely upon the ground that the act was unconstitutional as to the provsions referred to, no other question is pending before this court.

ANALYSIS AND MEANING OF STATUTE.

(a) Abstract of statute.

The act in full is printed in an appendix to this brief. An abstract of it is given by this court in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 399, 400, but as that abstract was directed to the meaning of section 8, and not especially to that of section 2, the following additional summary of the act is submitted.

The act is entitled:

> An act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.

Section 1 provides that persons doing the things mentioned in the title must register with the collector of internal revenue and must pay a special tax of $1 per annum. Exception is made of the employees of such persons and of Federal and State officers acting in their official capacity. It is made unlawful for any person to do the things mentioned in the title without having registered and paid the tax, and the Commissioner of Internal Revenue is given the usual power to make administrative regulations.

Section 2 is the important one for the purpose of the present case. It provides:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the

> aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

The transferer must preserve the order for inspection and the transferee preserve a duplicate for the same purpose. Four exceptions are made to this requirement of transfers on order forms only, but only the first two are material for the purpose of the present case.

(*a*) A physician may dispense or distribute the drugs directly without an order form, but this he can only do to a patient "in the course of his professional practice," and under the obligation to keep a record of the drugs so dealt in, except in the case of personal attendance on a patient.

(*b*) A druggist, or other ordinary dealer in the drugs, may sell them to a consumer without an order form, provided the consumer produces the written prescription of a physician registered under the act.

By the last paragraph of the section it is provided that the order forms, without which the drugs may not be transferred except through the intervention of a physician, can only be sold to persons who have registered and paid the special tax, and it is expressly provided that—

> It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in

the conduct of a lawful business in said drugs or in the legitimate practice of his profession.[1]

(b) Meaning of the statute.

Looking at section 2 of the act, in connection with the title and all the other provisions thereof, it is clear that the key to its meaning is in the distinction made between producers of, and dealers in, these drugs, on the one hand, and consumers of them on the other. The former must register and pay the special tax; the latter not. The incidence of the tax is placed upon the former by the title of the act, and by its first section, while the latter are not directly dealt with by the act at all. This distinction is believed to be fundamental. Assuming it to be the practical object in the mind of Congress, the natural end to be accomplished by the act in this connection would be to see that the drugs in question, in so far as the incidence of the tax upon them was concerned, came really and honestly into the hands of consumers, and did not, through the passport of a drug-

[1] The remaining provisions of the act are not exactly germane to the present case, and can, therefore, be placed in a note. Section 3 requires a registered person to give a full report of the drugs received by him. Section 4 prohibits the interstate, or analogous transportation by persons not registered. Section 5 provides for the preservation of the order forms, prescriptions, and returns, and their publicity or nonpublicity under certain circumstances. In this respect the act follows the general internal-revenue system on this subject. Section 6 is a *de minimis* section. Section 7 has the usual provision in internal-revenue statutes as to the application of the general administrative internal-revenue laws. Section 8 was construed in *Jin Fuey Moy's case*, 241 U. S. 394. As so construed it relates only to producers, dealers, etc., and prohibits the possession by them of the drugs unless they have registered and paid the special tax. Section 9 fixes the penalty for violation of any of the previous requirements of the act. Sections 10, 11, and 12 do not require consideration.

gist or doctor, come into the hands of a dealer who would not register, would not pay the special tax, and whose dealings would not be supervised by the Bureau of Internal Revenue. For this reason the sale of the drugs without registration and payment of the special tax was prohibited by section 1, and even their possession by dealers without registration and payment of the tax was prohibited by section 8. For this same reason the transfer of the drugs, except through official order forms, was prohibited by section 2. The handling in commercial intercourse of drugs of this character presents an entirely new proposition to internal-revenue officers. The facility with which they may be transferred, owing to the small quantities sufficient for successful production of and dealing in them, and the ease therefore with which the tax upon dealers may be evaded are evident, and therefore methods and means, which seem at first drastic, may nevertheless be properly deemed by Congress necessary to secure the assessment of *all* producers and dealers, while relieving genuine consumers.

Congress, therefore, had a right, possibly a duty, in dealing with a drug which so easily escapes detection as morphine and cocaine to provide that dealers in it should work under order forms issued by a public official; and that their receipts of the drug and their transfer of it to others should be regulated so that the drugs might not be sold to persons claiming to be consumers, and, therefore, not subject to the tax, but in reality dealers, and therfore subject to the tax and the supervision.

Congress, consequently, provided for the producers and dealers in the provisions of sections 1 and 2. It required the transferror and the transferee both to register in the normal case, and to pay the tax, and to use official order forms in their dealings with each other, so as to secure that both should so register and pay the tax.

It recognized, however, consumers in paragraphs (*a*) and (*b*) of section 2. It permitted the sale of the drugs to them either from a physician directly or from him indirectly through a prescription to a druggist. This is the normal way in which a bona fide consumer would procure the drugs and it is therefore the only way Congress was bound to recognize. In order, however, to prevent frauds on the revenue by the obtaining of the drugs under the guise of bona fide consumers by persons who in truth intended to deal in them without registering and paying the special tax, it required that physicians dispensing the drugs directly should do so only to "patients" treated in the course of professional practice, and that druggists should dispense the drugs only on "prescriptions" issued by a physician, and that neither of them should procure the drugs on order forms for any purpose other than the distribution of them to bona fide consumers—that is, genuine patients of a physician. These provisions gave sufficient legitimate opportunity to genuine consumers, although, like all revenue laws, working possibly inconvenience in individual cases. They likewise

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prevent (and this was clearly their purpose) persons intending to deal in the drugs from procuring large supplies in the guise of pretended "patients" or on bogus "prescriptions," and confined such persons to the use of official order forms which they could not procure unless they registered and paid the special tax.

The act thus looked at hangs together. It is true, of course, that it also had the moral purpose of discouraging the use of the drugs except as a medicine, but its main purpose as a revenue measure to see that dealers in the drugs do not escape the tax (as dealers in such drugs have a great opportunity to do) is clearly evidenced by the provisions as to order forms with their only alternative of a genuine prescription to a bona fide patient. These provisions to prevent fraud on the revenue may be drastic, but it can not be said they are not effective from a revenue point of view.

ARGUMENT.

THE CONSTITUTIONALITY OF THE ACT AS SO ANALYZED.

(a) The authorities.

It is believed no claim will be made that the general provisions of section 1 of the act levying an excise tax on producers of and dealers in certain drugs is unconstitutional, as it is in line with many other Federal excise taxes which have been sustained, e. g., those on wholesale and retail liquor dealers and on corporations doing business as such. The claim must be, therefore, that the special provisions of

section 2 which have been discussed above are so clearly and positively unrelated to the end of the collection of an excise tax as to constitute them beyond the legislative power of Congress. In order to determine whether this be true or not, a brief statement of certain decisions of this court upon analogous questions will be helpful as showing the attitude of this court toward the taxing power of Congress, and the presumptions which will be indulged in favor of the lawfulness of the means adapted by Congress to effectuate the exercise of that power.

(1) CERTAIN GENERAL DECISIONS ON THE USE OF THE TAXING POWER IN CONNECTION WITH SOCIAL OR MORAL ENDS.

The best-known example of the laying of taxes for other purposes than mere revenue is the protective tariff taxes whose constitutionality is now clearly established. Not only these taxes themselves, but also the means authorized for their assessment and collection were notoriously adopted largely for the purpose of encouraging the establishment and successful prosecution of certain industries. Under the same head might be put the tax on the use of foreign-built yachts, which was sustained in *Billings* v. *United States*, 232 U. S. 261.

In the *License Tax Cases*, 5 Wall. 462, a tax in the guise of a license was laid on the selling of lottery tickets, and the retail dealing in liquors. It was objected that such a license was an interference with the police powers of the several States. In

holding the act constitutional, this court said (5 Wall., p. 473):

> There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, a prohibitive and special tax was laid on the notes of State banks for the purpose (as was well known) of driving them out of circulation. In sustaining its constitutionality this court said (8 Wall. p. 548):

> It is insisted, however, that the tax in the case before us is so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is therefore beyond the constitutional power of Congress.
>
> The first answer to this is that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corpo-

> ration or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

In the *Head Money Cases*, 112 U. S. 580, the act levying a duty upon shipowners bringing alien passengers to this country from foreign parts was sustained. Answering the objection that the levy was not uniform because it did not apply to aliens brought by rail, this court said (112 U. S. 595):

> * * * It may be added that the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. * * *

In *Magoun* v. *Bank*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S., 41; and *Brushaber* v. *United States*, 240 U. S., 1, taxes graduated according to the amount of income of the taxpayer were sustained against the objection that they were in reality intended to affect the natural distribution of wealth, this court saying in the latter case (240 U. S. p. 25):

> In this situation it is of course superfluous to say that arguments as to the expediency of laying such taxes or of economic mistake or wrong involved in their imposition are beyond judicial cognizance.

In *in re Kollock*, 165 U. S., 526, the act levying a special tax on dealers in oleomargarine was sustained, the court saying (165 U. S. 536):

> The act before us is on its face an act for levying taxes, and although it may operate in

> so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.

In *McCray* v. *United States*, 195 U. S. 27, the later act levying a higher tax on oleomargarine was sustained over a very strong showing that it was intended merely to suppress the production of and dealing in oleomargarine, and was therefore an interference with the reserved police powers of the States. The reason given by the court was as follows (195 U. S. 63, 64):

> * * * As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due process clause of the fourteenth amendment, absolutely prohibit the manufacture of the article. It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it can not be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the fifth amendment. That provision, as we have previously

> said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

It may be noted as to this case that under the act (as it would seem) oleomargarine, even if so labeled and hence not deceptive, would have to pay a much higher tax than adulterated butter.

Certain cases in this court sustaining State taxing laws seem also in point.

In *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, a statute levying a tax upon refiners of sugar but exempting planters and farmers was sustained, the court saying (179 U. S. 95):

> The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws.

On page 93 of the opinion in this case several instances are given where Congress in levying Federal taxes has exempted classes on the principle of the Louisiana statute. Of these examples the act of

July 1, 1862, 12 Stat., 432, seems especially applicable to the present case, in that it levied a tax on retail dealers in goods, but excepted "apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or making of medicines for lame, sick or diseased persons." In *United States* v. *Calhoun*, 39 Fed. 604, Judge Simonton in charging the jury in a case of violation of this act (now section 3246, R. S.) said:

> An apothecary who bona fide uses spirituous liquor exclusively in the preparation or making up of medicines need not pay the special tax. These are the questions you must answer in this case: In the sale made by defendant to witnesses for the Government, did he bona fide sell the compound to them as medicine, and not as a beverage, or was the compound simply whisky in disguise? Is it a medicine to cure disease, or is it intended to gratify his thirst for drink? * * *

This statute and charge are not directly in point because the former merely exempted certain dealers, and the question was whether the person involved was liable to the tax or was covered by the exemption, while in the present case both Webb and Goldbaum have paid the tax as dealers; but they show the right of Congress, in order to prevent frauds on the revenue, to distinguish between persons prescribing the article as a medicine and persons merely pretending to do so, thus in effect regulating the business of a druggist or a physician.

In *Cook* v. *Marshall County*, 196 U. S. 261, a law of the State of Iowa imposing a heavy tax on retailers of cigarettes but exempting jobbers and wholesalers doing an interstate business was sustained. The moral purpose of this legislation is obvious.

In *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, an act levying a tax on all manufacturers within a certain class, to pay compensation to employees injured in any manufactory of that class was sustained, and on pages 244, 245 a number of instances and authorities are collected of taxes laid to correct a supposed social injustice.

Finally, in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402, this court said of the act now under consideration:

> It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the district court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right.

These cases (and many others which could be cited) demonstrate the strong reluctance of this court to declare a taxing act unconstitutional because it is claimed to interfere with the reserved powers of the States, or to have been enacted for other purposes than appear upon its face. If it be on its face a valid exercise of the taxing power, every reasonable presumption will be indulged in its favor. The mere fact that part of its purpose, or perhaps its main purpose, is to promote some

political, economic, social, or moral end is not sufficient to render it unconstitutional in the courts.

(2) SPECIAL AUTHORITIES ON THE MEANS WHICH MAY BE EMPLOYED IN A TAXING STATUTE.

Having thus observed the general attitude of this court toward taxing laws analogous to the act now under consideration, the next question is as to its attitude toward the means which Congress may constitutionally employ to reach its end (the decisive point in the case at bar in so far as question 2 is concerned).

In *in re Kollock*, 165 U. S. 526, the question was as to the validity of certain regulations covering the manner in which taxed oleomargarine should be packed and labeled. The Commissioner of Internal Revenue had provided by regulations as follows (165 U. S., p. 530, 531):

> * * * that the wooden or paper packages in which retail dealers in oleomargarine were required by said act of Congress to pack the oleomargarine sold by them, such retail dealers, should have printed or branded upon them in the case of each sale the name and address of the retail dealer making the same; likewise the words "pound" and "oleomargarine" in letters not less than one-quarter of an inch square, and likewise a figure or figures of the same size indicating (in connection with said words "pound" and "oleomargarine") the quantity of oleomargarine so sold, written, printed, or branded on such wooden or paper packages and placed before the said word "pound," and that the said words "oleo-

> margarine" and "pound" so required to be printed or branded on such packages as aforesaid in the case of each sale as aforesaid and the said figure or figures so indicative of quantity as aforesaid in the case of each sale as aforesaid and so required to be written, printed, or branded on such packages as aforesaid should be so placed thereon as to be plainly visible to the purchaser at the time of the delivery to him, such purchaser, by such retail dealers of the oleomargarine sold to such purchaser, by them, such retail dealers.

This court said as to these regulations (165 U. S. 536):

> And, *considered as a revenue act*, the designation of the stamps, marks, and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer.

The case of *McCray* v. *United States*, 195 U. S. 27, affirmed the constitutionality of the same act with a higher tax rate, and, while nothing was said as to the administrative measures adopted to carry out the revenue ends, the court, as pointed out above, approved expressly these administrative provisions as designed to prevent deception by the selling of oleomargarine for adulterated butter.

In *Nicol* v. *Ames*, 173 U. S. 509, an excise tax upon sales or agreements to sell at any exchange or board of

trade was held constitutional. The act, as stated by this court, as a basis for its decision, provided as follows (173 U. S. 513, 514):

> * * * *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof, as herein required, or who shall deliver such bill, memorandum or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.

In regard to this provision of the act, this court said (173 U. S. 523, 524):

> * * * It provides for a written memorandum containing the matters mentioned, simply as a means of identifying the sale and for collecting the tax by means of the required stamp, and for that purpose it secured by proper penalties the making of the memorandum. Instead of a memorandum, Congress might have required a sworn report with the proper amount of stamps thereon to be made at certain regular intervals, of all sales made subject to the tax. Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect
>
> The means actually adopted do not illegally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted some other means for collecting the tax which would prove less troublesome or annoying to the taxpayer, can surely be no reason for holding that the method set forth in the act renders the tax invalid. As it has the power to impose the tax, the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.

In *Felsenheld* v. *United States*, 186 U. S. 126, a case was certified to this court singularly like the present.

The first question was whether the third clause of the tenth section of the act of July 24, 1897, was constitutional (186 U. S., p. 130). The certificate had a statement of facts as in the case at bar, in which it was stated (186 U. S. 127) that manufacturers of tobacco had fallen into the habit of inclosing in their packages prizes for the persons who bought them, and that the Internal Revenue Bureau had promulgated a regulation that the tax should be paid on the full weight of the package including the prizes. It was stated in these regulations that the practice of including prizes, coupons, etc., should be discontinued. Acting upon the idea formulated in these regulations, Congress passed the third clause of the tenth section of the tariff act of 1897 which provided that no packages of tobacco or cigarettes should have packed in them anything else than the manufacturers' wrappers and labels, the internal-revenue stamp, and the tobacco itself; and there was an additional provision as follows (186 U. S., p. 127):

> * * * nor shall there be affixed to, or branded, stamped, marked, written, or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

The tobacco in question was forfeited because the owner of certain chewing and smoking tobacco inserted in the packages a small slip advertising his wares, and offering prizes to purchasers. The certificate stated (186 U. S. 129):

> This coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic

> value in itself, and has upon it no picture of any kind, *and does not affect, in any way, the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax.*

Upon this statement of facts the question was directly presented to this court as to the constitutionality of this legislation, which, it was claimed, was directed, under the pretense of taxation, at the offering of prizes, coupons, etc., to the purchasers of tobacco. This court sustained the constitutionality of the act in the following language (186 U. S. 132, 133, 134):

> It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal-revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable; that it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed; that in order to make such a regulation constitutional it is not necessary that there be either expressly or by implication an exception of those articles or things which by virtue of their minute size or weight do not apparently affect the collection of the tax. Congress may rightfully make the prohibition absolute and the courts may not draw a line between the foreign substance, which is trifling in size or weight, and that which is of appreciable size and weight, and hold, in reference to a particular package, the act valid if the size or weight is appreciable and invalid if it is not.

Among the regulations prescribed by Congress in its internal-revenue legislation are many which are purely arbitrary, or at least the necessity of which for the collection of taxes is not apparent. For instance, Congress has directed (Rev. Stat. 3392) that cigars shall be put up in boxes containing twenty-five, fifty, one hundred, two hundred and fifty, or five hundred each. There is no special efficacy in either of these numbers. Boxes containing fifteen, thirty, or sixty cigars would apparently afford just the same facilities for taxation, and yet can there be a doubt that Congress may make such a rule and compel each manufacturer to abide thereby? It has a right to select, and when it has made a selection, although there may be no special reasons for the specific numbers, and they are in fact arbitrarily selected, it may for purposes of uniformity compel compliance with the rule. So, if it should prescribe that at least nine-tenths of every package, purporting to be a package of a particular kind of tobacco, and subject to a special tax, should be that particular kind of tobacco, would the manufacturer be permitted to make one-third of the contents of some other kind of tobacco or any other substance? The proportion might be arbitrarily selected, it is true, but it is not clearly within the power of Congress in its regulations to make such arbitrary selection? And if it may say that not less than nine-tenths of the contents shall be that particular tobacco, the subject of the tax, is it any the less within the power of Congress to prescribe that there shall be nothing in the package save that tobacco?

> Indeed, the admission that the Government may require that the contents of a package shall be partly of the goods which it taxes is a concession that it may also require the entire contents to be such goods.
>
> There is in this statute no trespass upon the manufacturer's right to fully advertise his goods or to offer with the utmost freedom inducements for their purchase. He can put into the box in which he ships his packages all the advertising material he sees fit. That which is required is that each separate package shall be in its entirety a package of tobacco, and only tobacco. Beyond that the manner in which he shall sell, or the advertisement he shall make of his tobacco after the tax has been paid, and the packages have been stamped, is a matter for him to determine.
>
> We are of opinion that it is within the power of Congress to prescribe that a package of any article which it subjects to a tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to the tax.

In *United States* v. *132 Packages*, 76 Fed. 362, the Court of Appeals of the Eighth Circuit (Judges Caldwell and Sanborn) held constitutional the following provision of section 3449, R. S.:

> Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such an act to be done, he shall forfeit such liquors

or wines, and casks or packages, and be subject to pay a fine of five hundred dollars.

The court said (76 Fed. 367, 368):

> * * * The contention of the learned counsel for the claimant that the section is nothing but a trade-mark regulation is not tenable. It is one of the numerous regulations prescribed by the internal revenue laws intended to prevent frauds on the revenue in the manufacture, removal, shipment, and sale of distilled spirits and other liquors and to aid in the detection of such frauds. The regulations for this purpose are very extensive and extremely minute. They embrace every step in connection with the manufacture and handling of spirits, from the introduction of the raw material into the distillery down to the rectification of the product, and its removal, shipment, and sale. The court can not say that section 3449 does not conduce in any degree to prevent frauds on the revenue, or aid in their discovery and punishment. Unquestionably, an observance of the requirement that packages of liquor shall be shipped or removed only under names indicating truthfully their contents will aid the revenue officers to trace and identify such packages, and thereby verify the truth or falsity of the books and records of the distiller or rectifier. There are doubtless other ways familiar to the revenue officers in which the requirement of section 3449 tends to the detection and suppression of frauds on the revenue. Before a court would be authorized to hold an act of Congress obsolete and inoperative, it would have to appear conclusively that it was

> totally inoperative for any lawful or useful purpose. When the statute relates to a subject matter within the constitutional competency of Congress to legislate upon, the presumption is that it serves a useful purpose. When a statute is susceptible of two constructions, one of which would render it valid and operative and the other press it beyond the constitutional competency of Congress to enact, or render it inoperative, the former construction will be adopted. The section is none the less a revenue regulation because its enforcement may tend to discourage the piracy of trade-marks, and prevent frauds upon those who consume the contents of the packages. These are mere incidents of the statute, and not its primary object. Congress has an undoubted right to legislate to prevent frauds on the public revenue, and the validity of such legislation is not affected by the fact that it incidentally tends to the discovery or suppression of private frauds.

There is nothing in *United States* v. *Dewitt*, 9 Wall. 41, cited by this court in *Jin Fuey Moy's Case*, 241 U. S. 394, at page 401, opposed to the above decisions because in Dewitt's case no tax at all was levied upon the articles in question, and therefore this court said (9 Wall. 44):

> * * * And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential

> point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

These decisions demonstrate that the same presumption prevails in favor of the constitutionality of the means adopted by Congress to effectuate its exercise of the taxing power as prevails regarding the exercise of the power itself. It is not simply that this court does not claim the power to decide whether the means and methods adopted by Congress are wise and well advised or not. The rule goes much further than this. This court recognizes that where Congress has acted clearly in the exercise of its taxing power (as in the case of the act now under consideration), the means employed to effectuate this legitimate functioning are in their nature practical, belonging to the field of experiment and experience, and outside of the field of judicial knowledge. Hence, if it once be determined that the main provision of the act levying the tax and defining its incidence is constitutional (as it is undoubtedly in the act now under consideration), the means devised by Congress for the

collection of the tax and the prevention of frauds in connection with it will, except in the most extraordinary case, be held to be within the proper scope of the legislative power. Indeed, as this court has said, the very nature of the legislative power implies the power to select the means, methods, and agents by and through which the main powers conferred on the legislature by the Constitution may be carried into effect. This is not to say that this court will not consider a claim that the means employed by Congress to carry out its legitimate ends are in themselves unconstitutional. It is, however, to say that every presumption is against such a claim, and that if, by any reasonably fair intendment, the means can possibly be brought into connection with the main end of taxation, they will be sustained, and that no suspicion, however strongly supported, that these means were in fact designed for political, social, or moral ends, is sufficient to overcome the presumption. The burden is upon the objector (in this case the defendants), and he is bound to show, e. g., in the case at bar, that under no possible circumstances existing in the drug traffic among human beings at the present day, can such provisions as are contained in the act now under consideration relating to the use of order forms and physicians' prescriptions have any possible bearing on the collection of taxes constitutionally levied upon the producers of, and dealers in, these drugs.

(3) APPLICATION OF THESE AUTHORITIES, AND CONCLUSION OF ARGUMENT AS TO THE CONSTITUTIONALITY OF SECTION 2.

We have now abstracted and analyzed the statute in question, and have given our interpretation of its meaning; we have cited and quoted from authorities dealing with the exercise of the taxing power by Congress in cases analogous to this, and especially in cases dealing with the means, methods, and agents created by Congress to carry out its great taxing power. It only remains to apply the law declared by this court to the act now under consideration as above abstracted, analyzed, and interpreted. The minute the problem is approached in this way it is evident that the Government does not need the full benefit of the presumption which it is entitled to under the decisions in in re Kollock, *supra*, *Nicol* v. *Ames*, *supra*, and *Felsenheld* v. *United States*, *supra*. We insist that sections 1 and 2 of the act plainly, by their explicit terms, when carefully examined, show an intention of Congress to distinguish between consumers and dealers, for the purpose of revenue merely; that the provisions as to official order forms and physicians' prescriptions have a clear and direct connection with the prevention of frauds on the revenue in that they are aimed to prevent the obtaining of the drugs by dealers who do not intend to register and pay the tax, under the guise of genuine consumers, i. e., patients or drug addicts. The necessity and wisdom of these provisions as a prevention of frauds upon the revenue is recognizable

when there is borne in mind the present enormous traffic in these drugs and the well-known tendency of the illicit dealer in them as well as the habitual user to cover with every possible secrecy as far as possible both their sale and use.

From statistics and data obtained by special narcotic committee concerning this narcotic drug addiction it is conservatively estimated that there were treated or prescribed for during the year 1917 a total of 750,000 addicts of all ages and sexes. The fact that 214,941, or 80 per cent of the total number of 270,662 under treatment, reported from the entire United States were reported from the two States having compulsory registration furnishes a basis for approximating the total number of addicts in the country. Reports from an agricultural State in which registration is compulsory show that the addicts represent 0.7 of the population, while similar data obtained from an industrial State show the percentage of addicts to be 2.1. From this it may be estimated that there are 1,500,000 drug addicts in the United States, or 1.4 per cent of the total population. Congress, no doubt, having facts somewhat similar to these before it, in its wisdom saw fit to adopt the method it did in this law for the imposition of the tax and the assurance of its payment. "Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its judgment must be conclusive in that respect."

RECENT DECISIONS DEALING WITH THE CONSTITUTIONALITY OF THE ACT.

In the case of *Blunt* v. *United States*, decided by the Court of Appeals for the Seventh Circuit the indictment charged a violation of the next to the last paragraph of section 2 of the act, in that the defendant, a physician, had obtained, by means of the official order forms, certain drugs for a purpose other than the use of distribution of them in the legitimate practice of his profession. The Court of Appeals held that the provisions of section 2 referred to above were unconstitutional. The reason for the decision was stated by the court as follows:

> It does not, however, follow from any of these cases or from the principles underlying them, that because Congress may tax any article regardless of whether or not it be a legitimate article of interstate commerce, it may enact an intrastate prohibition law as to any such article. Its power under article 8, clause 1, of the Constitution, is only to pay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; not to regulate taxation throughout the land. And while a power to regulate interstate commerce may include the right to prohibit such interstate commerce as may be deemed harmful, *Lottery Case*, 188 U. S. 321, Hoke case, *supra* (but see *Hammer* v. *Dagenhart*, June 3, 1918), the power to pay taxes on an article includes no right to make any specific use of such tax paid article unlawful.

> This, however, is the sole purpose and intent of the last clause in section 2. No question of tax or revenue or the protection or security thereof is involved; under this clause, it is declared unlawful for a physician who has paid the required license fee and has bought the order form essential to obtaining the drug to consume it himself as a drug addict or to give it away or to sell it except in the legitimate exercise of his profession. In our judgment, this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the States.

The Court of Appeals in the Blunt case, however, sustained one of the counts in the indictment similar to the counts involved in the case at bar, namely, a count charging a sale of the drugs not upon the official order forms, so that the decision of the Court of Appeals of the Seventh Circuit is favorable to the Government in so far as the precise point raised in the present case is concerned. The Court of Appeals for the Fifth Circuit also held the act constitutional as to that portion involved in the present case in *Baldwin* v. *United States*, 238 Fed. 793, and a petition for a writ of certiorari was denied by this court on November 12, 1917, No. 725, October term, 1917. In addition, the constitutionality of the act, in so far as the provisions of subsection A of section 2 are concerned was sustained by Judge Learned Hand in the case of *United States* v. *Rosenberg*, 251 Fed. 963, the

court proceeding upon the principles stated in this brief.

It has also been upheld, as to its constitutionality, by the Circuit Court of Appeals of the Fourth Circuit in an opinion rendered December 5, 1918, in the case of *Walter F. Foreman* v. *The United States of America*, and by the Circuit Court of Appeals of the Eighth Circuit in *Hughes* v. *United States*, decided October 28 last.

In this latter opinion the Court of Appeals, speaking by Judge Hook, used the following language:

> It is urged that the purpose of the statute was the suppression of the drug habit and that it is therefore not a revenue measure but one of police within the exclusive province of the States. But we think it can not be said that the provisions referred to have no real or substantial relation to the raising of revenue. If they have such relation we have nothing to do with any other purpose of Congress. The traffic in such drugs is of a peculiar character. Considerable of it is carried on covertly by peddlers, and the small bulk of the articles facilitates clandestine distribution. The difficulties of subjecting the traffic to excise and preventing frauds on the revenue are obvious, and it was competent for Congress to bring the traffic into the open. That there may be consumers of the drugs who can not or will not obtain them in the ways provided is not enough to condemn the statute. Substantially the same result might have followed a heavy tax on such transactions, as to which

there would be no color for claim of unconstitutionality. In a case involving another provision this same statute was held to be a revenue measure. *United States* v. *Jin Fuey Moy*, 241 U. S. 394; 225 Fed. 1003.

CONCLUSION.

The judgment of the court below should be reversed.

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